

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERONICA GUTIERREZ, ERIN WALKER,  
and WILLIAM SMITH, as individuals and on  
behalf of all others similarly situated,

No. C 07-05923 WHA

Plaintiffs,

**ORDER RE TX 588**

v.

WELLS FARGO & COMPANY, WELLS  
FARGO BANK, N.A., and DOES 1 through 125,

Defendants.

At issue is whether a Federal Register announcement by a group of federal bank-related agencies (Trial Exhibit 588) should be allowed in evidence under Rule 803(8). The crux of the proffer is this paragraph in an otherwise thick document:

The Agencies are not addressing transaction processing order at this time. The Agencies believe that it would be difficult to set forth a bright-line rule that would clearly result in the best outcome for all or most consumers. For example, requiring institutions to pay smaller dollar items first may cause an institution to return unpaid a large dollar nondiscretionary item, such as a mortgage payment, if there is an insufficient amount of overdraft coverage remaining to cover the large dollar item after the smaller items have been paid.

74 Fed. Reg. at 5548 (col. 1).

Contrary to defendant, this passage — from 2009 — said nothing about the actual rationale of defendant years before when it adopted high-to-low processing in or before 2001.

There was no, moreover, “investigation” within the meaning of Rule 803(8)(C). The sources for the paragraph appear simply to have been “industry commenters” as referenced five times in the paragraphs immediately preceding in question. Nor did the paragraph make any “finding.” It merely explained why the Agencies did “not address[] transaction processing order at this time.”